While this action was pending and before the trial, the Murchisons, following a proxy fight, gained voting control of Alleghany. They thereupon substituted Alleghany for themselves as the plaintiff but with the same attorneys to prosecute the action. The final judgment dismissing the action on the merits after a lengthy trial was appealed from to the Court of Appeals. Initially and on May 19, 1964, that Court in a 2-1 decision affirmed the judgment of dismissal of the District Court (333 F. 2d 327).

The petition for rehearing to that Court had been made with the unanimous approval of the Board of Directors of Alleghany, including the two Kirbys and Ireland. Thereafter, on January 12, 1965, on a petition for rehearing *en banc,* that Court by a 4-4 vote adhered to the judgment of affirmance (340 F. 2d 311).

After the *en banc* reaffirmance of the judgment of affirmance, the Board of Directors of Alleghany met, deliberated and determined that a continuation of the litigation was not in the best interests of the corporation and accordingly voted not to petition for a writ of certiorari to review the judgment of affirmance. That action was taken at a meeting of the Board on February 9th, 1965 by an independent quorum and majority of the Board representing 1,800,000 shares of voting stock with a value of approximately $20,000,000 and upon advice obtained from independent counsel (App. pp. 6, 38). The respondent directors withdrew from the meeting when this matter was considered and voted upon.

Independent counsel expressed the view (App. p. 12) which was similarly expressed by petitioners' counsel to the Alleghany Board (App. pp. 24, 36) that it seemed unlikely that this Court would grant certiorari. The board did not rely upon these opinions alone. It took many other factors into account (App. pp. 5-6). These were all valid and

substantial reasons which any diligent board of directors would have to weigh in deciding what to do. Not the least of these was that a forced rescission of the settlement could result in restoration of the very valuable control of IDS to the Murchisons.

For the first time in the Court of Appeals, petitioners distorted those reasons and said that they amounted to a fear of winning and actually misled Judge Hays in his dissenting opinion to express that view.* As the Court of Appeals properly points out, these reasons did not relate to any "fear of winning" but were valid policy considerations hinged to the problems attending upon lengthy continuation of possibly, if not probably, fruitless litigation (4a-5a, footnote 1).

Nothing in the moving papers in the District Court attacked the honesty and good faith of the decision of the Board.

As already noted, petitioners' motion was to intervene as of right pursuant to FRCP 24(a)(2). The motion was argued before Chief Judge Ryan on the morning of April 9th, 1965. Judge Ryan gave the fullest consideration to the moving and answering papers and to the extended arguments of counsel. Because of the limitations of time, he wrote no formal opinion but endorsed his decision upon the moving papers as follows (App. p. 46):

> "Because of the urgency of the situation presented by this application, I have written no opinion. See reporter's minutes of hearing held. I find and conclude that the within application is not timely made and that the applicants have had and do have adequate representation. This application is denied. So ordered."

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* Judge Hays said that one of the Board's reasons was that a victory for the corporation would be embarrassing (and expensive) for Kirby (9a). There is simply nothing in the record to support this statement.

On April 21, 1965, the Court of Appeals affirmed his decision holding, as he did, that petitioners had adequate representation, and that their motion to intervene was not timely. The petition to this Court followed.

ARGUMENT.

POINT I.

The denial of petitioners' motion to intervene as of right was correct and proper.

Judge Ryan's decision and the judgment affirming it obviously must be considered in the light of the petitioners' moving papers and Alleghany's opposing papers on the motion to intervene. There is really no dispute between the parties as to the facts and circumstances. Briefly, they are as follows:

The independent directors of Alleghany, constituting both a quorum and a majority of the Board and after obtaining and giving careful consideration to the opinions of petitioners' counsel (then counsel to Alleghany) and of independent counsel of their own choosing, unanimously decided that it was not in the best interests of the corporation to apply for a writ of certiorari. Petitioners' moving papers in the District Court do not dispute the fact that the directors who took this position acted independently of the interested members of the Board.

These moving papers (Appellants' Appendix, Court of Appeals, 5a-18a) do not even hint that the decision of the independent directors not to apply for a writ was the result of domination, corruption, fraud, dishonesty or any other venal purpose or motive.

On the contrary, petitioners' counsel conceded before Judge Ryan that "... we don't question the integrity of the men involved..." (App. p. 43). On the argument in the

Court of Appeals, petitioners' counsel refused to characterize the Board as "dominated" by the Kirby group (7a, footnote 3). As a group the members of the Board who participated in the vote own or represent over 1,800,000 shares of common stock, which currently are worth approximately $20,000,000 (App. p. 38). If petitioners' prophecy of a recovery of $60,000,000 were correct, this group would realize an enhancement of their equity of over $10,000,000. They would not let such an opportunity slip by if they had any confidence in it. Under these circumstances, petitioners had no right to intervene under Rule 24(a)(2) for the purpose of prolonging it.*

It is well settled that the determination of a board of directors of a corporation made in good faith not to prosecute or not to defend a claim in litigation cannot be superseded by a disagreeing stockholder.

In *Swanson* v. *Traer*, 249 F. 2d 854 (7th Cir. 1957), the Court affirmed a dismissal of a complaint in a derivative stockholder's action where it appeared that the corporation acting through an independent majority of its board of directors had decided not to prosecute a claim against certain allegedly wrongdoing directors.** After an exhaustive review of the relevant authorities, including decisions of this Court, the opinion observed (p. 858):

> "To be consonant with the reasoning and policies in the cases above cited we must hold that if a board of directors, a majority of which are admittedly honest and have not been involved in the alleged wrongs,

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* In the District Court petitioners did not criticize the reasons actuating the independent directors. They did this for the first time in the Court of Appeals.

** For the earlier history of this case, see *Swanson* v. *Traer*, 230 F. 2d 228 (7th Cir. 1956), particularly at pp. 235-7. It is noteworthy that petitioners failed to comment on this leading case either in the Court of Appeals or in their petition here.

> refuses a demand to bring suit, then the complaining shareholders' judgment shall not be substituted for that of the directors."

This is the established general rule. It is certainly the rule in New York. See *Blaustein* v. *Pan American Petroleum & Transport Co.*, 293 N. Y. 281, 303-304 (1944).

The right of directors acting in good faith to manage the affairs of a corporation necessarily extends to and includes the right to control litigation. In *Mendelson Bros. Factors, Inc.* v. *Sachs*, 253 App. Div. 270, aff'd 279 N. Y. 604 (1938) the Court held that the plaintiff shareholder was barred from maintaining his action against certain directors of the corporation where the corporation through an independent majority of the board and in good faith settled the claims against these directors.

It is, therefore, clear that petitioners have no right to intervene pursuant to Rule 24(a)(2). The basis for intervention is "inadequate representation" by the board of directors. This, in turn, is established only by a showing of corruption, fraud or dishonesty. See, for example, *Pyle-National Co.* v. *Amos*, 172 F. 2d 425, 427 (7th Cir. 1949).

In *Sam Fox Publishing Co.* v. *United States*, 366 U. S. 683 (1961), individual members of the American Society of Composers, Authors and Publishers (ASCAP) had sought to intervene as of right in a proceeding to modify a consent decree previously entered in a government anti-trust suit against ASCAP. This Court found that while appellants "may be" bound within the meaning of Rule 24(a)(2) as to the external affairs of the Society, there was no showing that representation by ASCAP was inadequate.

> "The issue of inadequacy of representation could arise on this phase of the case only on some showing that ASCAP, which ostensibly has the same interests

> as appellants on this aspect of the litigation, was in fact conducting the litigation in bad faith, collusively, or negligently. No such contention has been made." (366 U. S. at p. 692, n. 4)

The District Court held that petitioners could not substitute their wishes for the honest judgment of an independent board of directors acting in good faith (App. pp. 39, 44, 46). The Court of Appeals agreed stating that it knew of no proposition of law that permits shareholders, absent allegations of bad faith, collusion or negligence, concededly not present or charged here, to intervene as of right, to continue litigation that independent members of the board of directors, acting in good faith and in the exercise of sound business judgment, have decided to terminate (6a).

Petitioners now rely on Mr. Kirby's return to control of Alleghany in December, 1963 as equalling "inadequate representation." But the facts are that (1) the petition for rehearing *en banc* was authorized by the very Board of Directors which decided not to petition for a writ of certiorari, (2) the director-defendants voted with the independent directors to authorize the petition for rehearing and (3) all of this happened after Mr. Kirby's return to control. These facts were before Judge Ryan in the District Court. He properly felt that they strongly evidenced that representation was adequate (App. p. 31).*

Petitioners also stress the fact that the Board of Directors did not notify the shareholders of its decision not to apply for a writ. There was no duty on its part to do so. Petitioners' counsel acknowledged this in the District Court (App. pp. 25, 34).

* Even if Mr. Kirby were a majority stockholder (which he is not), that would not establish a dominated board. See *Fletcher, Cyc. Corp.*, Sec. 939, 1965 Ed. at p. 422.

Petitioners rely heavily on the dissenting opinion of Judge Hays, which says that it is naive to believe that the Board of Directors was not subject to the determinative influence of Kirby when it voted not to proceed with the case. Neither Judge Ryan in the District Court nor Judges Kaufman and Anderson in the Court of Appeals thought so.

Using this observation of Judge Hays as a springboard, petitioners now contend that to warrant intervention they need only show that Kirby was the controlling stockholder at the time the Board of Directors decided not to petition for certiorari. Petitioners argue for a rule of law contrary to all existing authority, both decisional and statutory, and in derogation of the essential principle that management of a corporation is in the hands of the board of directors absent a showing of fraud or bad faith. Petitioners would give any stockholder the absolute right to subject *every* decision of a board of directors involving a controlling shareholder and the corporation to judicial review. Clearly, this is not the law. See for example, *In Re New York Rys. Corp.*, 82 F. 2d 739 (2d Cir.), *cert. den.* 298 U. S. 687 (1936) where the court held that a transaction between a corporation and its majority shareholder is not voidable merely because the majority shareholder had the power to, and did in fact, elect the board of directors which approved the transaction.

The correct rule was succinctly stated by the court in *Blish* v. *Thompson Automatic Arms Corp.*, 30 Del. Ch. 538, 64 A. 2d 581 (1948) as follows (p. 606):

> "... The appellant's assertion of fraud based upon the theory that since Maguire was President and majority stockholder of TAAC he necessarily dominated and controlled the Board of Directors are insufficient observations to impugn the integrity and independence of the Directors."

To the same effect are:

Cowell v. *McMillin*, 177 Fed. 25, 43;
Rogers v. *Nashville & St. Louis Railway Co.*, 91 Fed. 299, 313;
Bell v. *Fred T. Ley & Co.*, 278 Mass. 60, 179 N. E. 294;
Blaustein v. *Pan American Petroleum & Transport Co.*, 293 N. Y. 281, 302-303.

The petitioners, borrowing again from the dissenting opinion, characterize the absence of the controlling stockholder from the deliberations of the board as an "empty ceremonial" (9a). This characterization has no foundation in law or fact. In *Blish* v. *Thompson Automatic Arms Corp., supra,* the court sanctioned such a procedure. It held that in the absence of fraud, the decision of the independent directors, made in the absence of the interested directors and the controlling shareholder, to authorize the issuance of 3,600 shares of the corporation's stock to the absent directors was not voidable.

Legislative approval of the general principles discussed above is embodied in Section 713 of the recently enacted *New York Business Corporation Law.* Section 713 recognizes that a fundamental prerequisite to a successful attack on a transaction between a corporation and a director or officer is a showing that the directors who approved the transaction acted fraudulently, collusively or negligently.

The cases cited by petitioners do not support their claim to intervention as a matter of right. *Wolpe* v. *Poretsky*, 144 F. 2d 505 (D. C. Cir. 1944), *cert. den.* 323 U. S. 777 (1944) was a zoning case and did not involve a stockholder's action at all. There, the *statute* gave the property owner the right to contest a zoning regulation. It was held that the property owner could assert that right by intervention in

an action after the zoning board declined to appeal an adverse judgment against it which would necessarily affect the rights of the property owner. This was not a derivative right; it was a primary personal right created by statute.

Similarly in *Atlantic Refining Co.* v. *Standard Oil Co.*, 304 F. 2d 387 (1962) the intervening company had a personal right and interest separate and distinct from the Government to uphold the federal regulations under attack which restricted the large companies and favored the smaller ones. Again there was nothing derivative about the rights being asserted.

Petitioners rely on *Park & Tilford* v. *Schulte*, 160 F. 2d 984 (2d Cir. 1947) and *Pellegrino* v. *Nesbit*, 203 F. 2d 463 (9th Cir. 1953). These two cases involved §16(b) of the Securities Exchange Act of 1934 which confers an unusual cause of action upon a corporation, enforceable under certain circumstances by a stockholder, and emphasizes absolute liability for "short swing" profits by a corporate "insider". The *sui generis* nature of §16(b) is well recognized and intervention considerations applicable to §16(b) causes of action have no relevance to normal intervention considerations, such as are involved in the case before this Court. The rationale of *Pellegrino* v. *Nesbit*, 203 F. 2d 463 (9th Cir. 1953) supports our view. There the court expressly stated that the general rule was that the board of directors determined whether to litigate but that Section 16(b) created an exception to that general rule. In this connection, the court said (pp. 466-467):

> "* * * Appellees rely upon the general rule that a corporation's board of directors may, subject to the exercise of good faith and a reasonable business judgment, determine whether the best interests of the corporation and its stockholders would be served by engaging in litigation. This argument ignores the limitations imposed upon the usual discretion of a

board of directors by the language of §16(b). Any stockholder has a right to institute suit if the corporation fails to do so, regardless of the good faith or reasonable business judgment of the board of directors. Moreover, once it commences litigation, the company's duty is not merely to determine diligently *whether* prosecution of the suit should continue, but, rather, the company has a duty *diligently to prosecute* the suit."

Molybdenum Corp. v. *International Mining Corp.*, 32 F. R. D. 415 (S. D. N. Y., 1963) merely held that when a stockholder wanted to assert rights under Section 16(b) by intervention, he must move to intervene pursuant to FRCP 24(a)(2).

It is plain, therefore, that the determination of the board is dispositive of the litigation; that petitioners have no right to set their wishes against that determination; that the Section 16(b) cases and others cited by petitioners are inapplicable and that, on the record before him, Judge Ryan had no choice but to deny the motion. As he so aptly stated to counsel for petitioners (App. p. 31):

"* * * while you, as a zealous advocate, might not feel that a decision of the board of directors of Allegheny now made not to proceed further by filing a petition for a writ is wise, you cannot supplant your decision on business as well as legal matters for their own judgment and the advice they get from their own independent counsel."*

Finally, petitioners now argue in a footnote at p. 13 of their Petition that they need not show fraud, domination or collusion to intervene because the action was originally commenced as a shareholders derivative action. This argu-

* In *Stadin* v. *Union Electric Company*, 309 F. 2d 912 (8th Cir. 1962), cert den., 373 U. S. 915 (1963), it was held that mere difference of opinion among attorneys is not of itself "inadequate representation".

ment overlooks the obvious fact that the action was taken over by the corporation. Thereafter, for a shareholder to re-assert control over the litigation he must show that the Board of Directors through fraud, bad faith or negligence failed to adequately represent his interests. It further overlooks the fact that these petitioners knew that the action had been taken over by the corporation (App., p. 33), and that Kirby had regained control in December, 1963. Despite their knowledge of these facts, petitioners now argue on the one hand that their representation by the Board of Directors became inadequate when Kirby regained control, and on the other hand that their application was timely even though made 16 months after their representation allegedly became inadequate. See Judge Kaufman's recognition of petitioners' dilemma (7a); also our treatment of untimeliness, *infra.*

POINT II.

The application to intervene was untimely.

The timeliness of an application to intervene is a matter committed to the discretion of the District Court, whose decision should not be reversed on appeal absent a clear showing of abuse of discretion. *Simms* v. *Andrews,* 118 F. 2d 803 (10th Cir. 1941). The District Court found that petitioners' motion to intervene here was not timely (App. pp. 30, 40, 46).

The application for intervention, coming as it did after entry of final judgment and after affirmance of that judgment by the Court of Appeals, sitting *en banc,* requires an even stronger showing of timeliness than would otherwise be necessary. Such tardiness calls for denial of intervention. *Basle Theaters, Inc.* v. *Warner Bros. Pictures Dist. Corp.,* 24 F. R. D. 476, 477 (W. D. Pa. 1959). See also *Morin* v. *City of Stuart,* 112 F. 2d 585 (5th Cir. 1939); *McKenna* v. *Pan American Petroleum Corp.,* 303 F. 2d 778 (5th Cir. 1962).

The decision not to seek certiorari in the present case was made by unanimous action of the independent directors on February 9, 1965. Immediately thereafter it was communicated to the firm of Townley, Updike, Carter & Rodgers which represents petitioners. It was conceded by petitioners' counsel, at the hearing before Judge Ryan, that petitioners "have followed the fortunes or ill fortunes of the Alleghany Corporation through this litigation with pretty close attention", that they were advised long ago that it was based upon a challenge of the settlement of a state court lawsuit and chose not to intervene, and that they became aware of the principal steps in this lawsuit since its institution as they occurred (App. p. 19). Specifically, as their counsel pointed out to the District Court, the petitioners knew that Mr. Kirby regained control of Alleghany (App. p. 33) and that was back in December 1963 (Petition p. 4). But these knowledgeable ladies (App. p. 19) made no attempt to intervene then or at any time thereafter until 4 days before the expiration of the time within which to apply for a writ.

In sustaining the finding of the District Court that petitioners' attempt to intervene was untimely, Judge Kaufman, writing for the majority of the Court of Appeals, said (7a):

> "* * * As we have noted, there are no allegations or claims that the Board of Directors acted in bad faith, fraudulently or dishonestly, but we shall assume, *arguendo*, that the applicants' interests may have been or are inadequately represented despite the absence of such charges because the Board of Directors was acting under what counsel, at oral argument, picturesquely characterized, but without anything more than his *ipse dixit*, as 'the brooding presence' of the Kirby group.
>
> "But even that *arguendo* assumption, when considered with the background of the applicants'

> asserted long-time interest in this litigation and the fact that the Kirby group regain [sic] direct control of the Corporation as long ago as December, 1963, would compel us to agree with the District Judge's findings and to conclude that he acted well within the bounds of his discretion in determining that the application to intervene—made sixteen months later —was untimely."

Petitioners' argument is that their action here was timely because they were not advised of the Board's February 9, 1965 decision until Sunday, April 4, 1965. The short answer to this contention is that there was no duty on the part of the Board to inform them of its decision. Petitioners have conceded the absence of any such duty (7a; App., p. 34).

For the first time in their Petition (p. 5) the petitioners refer to an application made by the firm now representing them, but at the time in question representing Alleghany, to the Court of Appeals for the Second Circuit for an order authorizing them to petition for a rehearing or allowing them to take other steps for the continued prosecution of the appeal which Alleghany had lost. They suggest that this was what led to the Board's decision to authorize the application for a rehearing *en banc*. There is no basis in the record for such a belated suggestion. Indeed the aforesaid counsel stated the contrary before Judge Ryan (App., p. 23). The only present significance of that application is that it shows the acute preoccupation of the firm of Townley, Updike, Carter & Rodgers at that time with the further prosecution of the action.*

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* The record does not reveal the deliberations of these knowledgeable petitioners when on Sunday, April 4, 1965 they decided that they should attempt to apply for a writ of certiorari. We are only told that it came as a surprise to them that Alleghany was not going to make such an application (App., p. 25). They must

POINT III.

Petitioners have failed to show the presence of any of the considerations governing review on certiorari prescribed by Rule 19.

No action by a state court is here involved. Hence subdivision (a) of Rule 19 is inapplicable.

Petitioners try to come within subdivision (b) of Rule 19 by contending that the decision of the Court of Appeals is in conflict with the decision of another court of appeals on the same matter. This is not so. They cite no case in any other circuit where intervention was permitted after affirmance by a court of appeals to permit an application for a writ of certiorari to this Court.

It is also clear that the decision below does not involve an important question of federal law which has not been, but should be, settled by this Court, and equally clear that it has not decided a federal question in a way conflicting with applicable decisions of this Court. Many years ago this Court declared the general rule in *Hawes* v. *Oakland*, 104 U. S. 450, that in the absence of fraud or bad faith directors manage the affairs of a corporation. This Court has never indicated a contrary view. It is noteworthy that petitioners cite no decision of this Court with which they claim the decision below is in conflict.

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have been knowledgeable indeed to be aware of this refinement of federal appellate practice. It is hard to believe that when they authorized the application these ladies also knew that they could not personally profit by a successful outcome except to the extent that the value of their investment might be nominally enhanced whereas they were becoming personally liable for all of the costs and expenses of further proceedings. These costs and expenses have already exceeded any phantom profit to them which would result from success. We are constrained to conclude that this is still another skirmish in the battle of tycoons with the independent directors in the middle.

Nor has it even been suggested that the Court of Appeals for the Second Circuit in denying intervention so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. The established modes of procedure were followed both in the District Court and in the Court of Appeals.

Instead of addressing itself to the considerations expressly prescribed by Rule 19 of this Court, the petition employs a diversionary tactic and suggests various insubstantial reasons (Petition, pp. 10-14) why petitioners should be permitted to continue further a litigation which the corporation itself, through independent directors acting in good faith, has decided to terminate.

These diversionary arguments are so beside the point that the petition (p. 14) now obliquely questions the independence of the members of the Board who voted not to apply for a writ even though, in the District Court, petitioners' counsel conceded that their motives could not be, and were not being, questioned (App. p. 43), and even though in the Court of Appeals in response to a question from the Court, petitioners' counsel expressly refused to characterize the board as "dominated" by the Kirby group (p. 7a).

The lengths to which the petitioners are now prepared to go is further illustrated by references to the New York Times (Petition, p. 14). They also go outside the record to state that there is a registration statement in preparation which would make the shares of these independent directors eligible for sale. However, they have to concede that there is no present intention to sell the shares (Petition, p. 14). The only purpose of this reference is to attempt to create the impression that these directors were indifferent to the welfare of the corporation. This is not so. Since the shares involved were part of a block of shares that here-

toforc represented "control" stock, the purpose of the registration was merely to make the shares eligible for sale and thereby to increase their marketability and value. This certainly has no bearing on the independence of the board or upon the good faith of the action of its members in voting not to apply for a writ.

All of these matters are a far cry from the considerations governing review on certiorari prescribed by Rule 19.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARK F. HUGHES,
Counsel for Respondent
Alleghany Corporation.

ALLAN F. CONWILL,
VINCENT R. FITZPATRICK,
ANTHONY F. PHILLIPS.

APPENDIX.

Letter of Retainer.

April 7, 1965

JAMES W. DEER
30 BROAD STREET
NEW YORK CITY

MESSRS. WILLKIE FARR GALLAGHER
WALTON & FITZGIBBON
1 Chase Manhattan Plaza
New York, N. Y.

Gentlemen:

I am writing you in connection with a development which has occurred in the case of *Alleghany* v. *Kirby*, concerning which you have previously advised the nine members (the "independent directors") of our board of directors who are not involved in it.

As you know, the Alleghany board consists of thirteen directors, three of whom are defendants in this litigation, and a fourth is a relative of two of them. Since the board came into office in December, 1963, all matters relating to this litigation have been handled for the board by the nine members who have no connection with the case, and such legal advice as the corporation has had in the matter has come either from Messrs. Townley, Updike, Carter & Rodgers or from you at the request of the independent directors.

I am advised that an application will be made in this case to the United States District Court for the Southern District of New York, on Thursday or Friday of this week which may require further action by the corporation or by the independent directors.

Mr. Updike has advised counsel for the defendants that he intends to make an application to Chief Judge Ryan for

an order directing the defendants to show cause why two preferred stockholders of Alleghany should not be allowed (1) to intervene in this action for the purpose of making an application to the United States Supreme Court for a writ of *certiorari*, and (2) to have some enlargement of time beyond April 12th, the final day under the Rules of the Court, within which to make such application for a writ. At the Alleghany board meeting on February 9th, the independent directors voted unanimously not to authorize Mr. Updike's firm to apply for a writ, and so advised him the same day.

The defendants, of course, will oppose Mr. Updike's application. Although the firm of Townley Updike Carter & Rodgers are still the attorneys of record for the corporation, that firm obviously cannot adequately or properly represent the corporation in view of the corporation's decision not to authorize an application for a writ, nor effectuate the unanimous judgment of the independent directors that continuation of the litigation is not in the best interests of the corporation.

Because of time limitations, it has not been possible to hold a formal meeting of the Board. However, the independent directors have been canvassed and I am authorized by them to request you to appear before the Court on this application and any related matters on behalf of the nine independent members of the board of Alleghany Corporation, and the corporation, and that you take such steps as you deem necessary or appropriate to protect their interests.

Very truly yours,

JAMES W. DEER

JWD•CR

[3656-3660]*

Affidavit of James W. Deer.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

ALLEGHANY CORPORATION, Plaintiff, *against* ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR., and FRED M. KIRBY, Defendants.	60 Civ. 3511

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES W. DEER, being duly sworn, deposes and says:

1. I am a member of the Bar of the State of New York and of this Court, and am a partner in the firm of Holtzmann Wise & Shepard, 30 Broad Street, New York, N. Y.

2. Since October, 1962 I have been a member of the board of directors of Allegehany Corporation. As a director I am familiar with the developments in this litigation and the action taken by the board with respect to this litigation during the period since my board service began.

3. When, in May, 1964, the United States Court of Appeals for the Second Circuit affirmed Judge Dawson's decision dismissing this action, I, acting in my capacity as a director, consulted the firm of Willkie Farr Gallagher Walton & Fitzgibbon as to my obligations as a director with respect to continuation of this litigation. The Willkie firm had previously been retained by the Murchison controlled board of Alleghany in the spring of 1963 in connection with other matters.

* Numbers in brackets refer to pages in the original record.

Affidavit of James W. Deer.

4. On June 9, 1964, along with all the other members of the Alleghany board, I voted to authorize the firm of Townley Updike Carter & Rodgers to seek reargument *en banc* of the decision of the Court of Appeals.

5. Following the grant of the application for reargument and the subsequent 4-4 affirmance of the original decision on January 12, 1965, I again consulted the Willkie firm as to the obligations of the directors of Alleghany with respect to this case.

6. Under date of February 8, 1965 the Willkie firm rendered an opinion (a copy of which is attached as Exhibit A) to me in my capacity as an Alleghany director advising me in substance that the independent directors of Alleghany were free to exercise their best business judgment as to whether or not they should cause Alleghany to apply for *certiorari* in this litigation. The board also consulted the Updike firm, and received their opinion dated February 1 that they should authorize an application for *certiorari*. Copies of both opinions were furnished to all the members of the board prior to their regular meeting on February 9th. The board met on February 9th and the four directors who are personally involved in this litigation absented themselves from the meeting. After a full discussion of the matter the independent directors voted unanimously (one director abstained for personal reasons) not to authorize the Updike firm to apply for *certiorari* on the ground that it would not be in the best interest of the corporation to do so. I personally informed Mr. Updike of this decision, and the reasons for it, the same day. The Willkie firm was also informed of our decision and our reasons for it the following day.

7. In reaching this conclusion the independent directors considered that they should take into account not merely the relatively modest cost of an application for *certiorari*, whatever its prospects for success, but also what was likely

to happen to the corporation if *certiorari* were granted and the decisions of the lower courts were thereafter reversed and the case sent back for further proceedings. Among other things, the directors considered the following:

(a) The likelihood that this litigation would continue for many years, with millions of dollars of expense to re-litigate an issue which has been vigorously litigated in one form or another since 1955 and on which the corporation has never prevailed;

(b) The likelihood that the litigation, at least insofar as the board was advised by the Updike firm, would proceed against Kirby alone, even though he was the only person involved in the 1950 exchange transaction as to whom everyone, including Judge Friendly, had agreed no case of fraud or wrong-doing had been made out;

(c) The fact that a reversal by the Supreme Court might require it to re-open the State Court judgment in *Zenn* v. *Anzalone*, and the uncertainty as to what reopening that judgment would mean to Alleghany's control of Investors Diversified Services, Inc. (IDS). This judgment, which terminated litigation against Kirby, Murchison Brothers, the Estate of Robert R. Young and Robert W. Purcell, also compelled Murchison Brothers to return control of IDS to Alleghany. The value of Alleghany's IDS investment is in excess of $115 million and this investment constitutes over half of Alleghany's total assets. Control of that investment both in the legal and economic sense is of crucial importance to Alleghany and the directors did not want to risk losing it.

(d) The certainty that continued litigation would deprive Alleghany stockholders of a management able to concentrate on Alleghany affairs instead of being diverted for years by a continuation of litigation

already ten years old. In this connection the directors bore in mind the fact that this same litigation had paralyzed the affairs of the corporation for at least five years from 1955 to 1960.

In short, the directors concluded that the prospects for ultimate benefit to Alleghany by pursuing this litigation were uncertain at best and the detriment to Alleghany in doing so was real and substantial. On this basis the directors exercised their business judgment and voted to discontinue the lawsuit.

8. None of the directors who voted not to authorize Mr. Updike to seek to continue the litigation is under Kirby domination or associated with him as employee, supplier, etc. They all have a large financial stake in Alleghany and exercised their judgment as to how best to protect it. They represent on Alleghany's board almost 20% of Alleghany's outstanding stock, which is owned by companies of which they are themselves directors or officers. Mr. Lincoln represents the Nationwide Insurance Companies on the Alleghany Board. The Nationwide Companies own in the aggregate approximately 789,000 shares of Alleghany common stock plus 9,200 shares of preferred and 85,100 warrants. Mr. Odell represents Allied Properties, of which he is chief stockholder and which owns 450,000 shares of Alleghany common stock. Mr. Hunt represents Coral Ridge Properties, Inc., of which he is principal stockholder and which owns in excess of 100,000 shares of Alleghany common stock. Each of the other directors has a substantial personal Alleghany holding. I represent Gamble-Skogmo, Inc., which owns 500,000 shares of Alleghany common stock.

9. An attempt at the eleventh hour to overturn the business judgment of the nine independent directors of Alleghany, in a matter in which their own financial stake is enormously greater than that of the applicants here, is

an unwarranted intrusion on the business judgment of the board of directors of the corporation.

10. For the foregoing reasons I respectfully request that the application to intervene be denied.

JAMES W. DEER

Sworn to before me this
8th day of April, 1965.

ROSE H. SUELT,
Notary Public.

ROSE H. SUELT
Notary Public, State of New York
No. 41-3891000
Qualified in Queens County
Commission Expires March 30, 1967

[3661-3669]

Exhibit to Deer Affidavit.

WILLKIE FARR GALLAGHER WALTON & FITZGIBBON
1 Chase Manhattan Plaza
New York, N. Y. 10005

Harold J. Gallagher
Charles M. Walton, Jr.
Claude M. Terrell
Louis F. Carroll
Thomas N. Tarleau
Mark F. Hughes
Edward McGarvey
Walter H. Brown, Jr.
Walston S. Brown
Helmer R. Johnson
Sumner S. Kittelle
S. Weldon O'Brien
Ethan Allen
Sidney L. Smith
Robert B. Hodes
Allan F. Conwill
Allan Trumbull
Lawrence S. Pratt
Vincent R. Fitzpatrick
Henry L. Ughetta II
Bowie K. Kuhn
Brian M. O'Brien
Kenneth J. Bialkin
David B. Rea
William T. Sullivan
Harvey L. Sperry
Louis A. Craco

JOSEPH M. CALLAHAN
COUNSEL

TELEPHONE
212 HANOVER 2-3100

CABLE ADDRESS
"CONVEYANCE"

February 8, 1965

James W. Deer, Esq.
30 Broad Street
New York, N. Y. 10004

Re: *Alleghany Corporation* v. *Kirby et al.*

Dear Mr. Deer:

This is in response to your letter dated January 21, 1965 in which our advice was requested by you in your capacity as a director of Alleghany Corporation ("Alleghany") in connection with the above litigation.

Exhibit to Deer Affidavit.

QUESTIONS CONSIDERED.

We have examined (a) the opinion dated May 28, 1963 of the United States District Court for the Southern District of New York in the above entitled action (the "District Court Decision") which held that judgment should be entered for the defendants dismissing the complaint, (b) the opinion dated May 19, 1964 of the United States Court of Appeals for the Second Circuit (the "Initial Second Circuit Decision") which affirmed the District Court Decision, Judge Friendly dissenting, and (c) the recent *per curiam* decision *en banc* of the United States Court of Appeals for the Second Circuit (the "En Banc Decision") which affirmed the District Court Decision by an equally divided court, Chief Judge Lumbard not participating. Examination of the opinions alone cannot enable us to express an informed judgment on the merits of this litigation. We believe no useful purpose would be served at this point by our conducting a thorough examination into the extensive history of these proceedings, for we understand from your letter and our subsequent conversations that your inquiry is directed toward the responsibility of Alleghany directors to Alleghany stockholders on the question whether a review of the En Banc Decision by the United States Supreme Court on writ of certiorari should be sought.

BASIC DUTY OF ALLEGHANY DIRECTORS.

It is, of course, fundamental that the duty of the members of the Alleghany Board is to use due care and good faith in exercising their best judgment in determining whether authorization of a petition for a writ of certiorari is in the best interest of Alleghany. In exercising this judgment and in the deliberations leading to it a prime requisite is objectivity. Therefore, no Alleghany director who is interested in the ultimate outcome of the litigation should participate either in the decision of the deliberations in

that connection. This would exclude those directors who are named defendants—Allan P. Kirby, Charles T. Ireland and Fred M. Kirby—and any other director whose objectivity would be impaired by reason of any close family ties or business relations with or domination by any of the named defendants.

The decision should be made by a majority of a quorum of genuinely disinterested directors. These directors should consider the question as if the defendants were persons wholly unconnected with Alleghany in order to avoid the possibility of having their decision influenced by any effect it may have on the actual named defendants. Whether he can decide with the necessary degree of objectivity is a matter to be determined by each director individually.

LIKELIHOOD OF GRANT OF WRIT OF CERTIORARI

No party may obtain a review by the Supreme Court on writ of certiorari as a matter of right. Such a review is solely within the discretion of the Court, and its Rule 19 sets forth the criteria which guide, though not necessarily control, the exercise of that discretion as follows:

> "Where a court of appeals has [1] rendered a decision in conflict with the decision of another court of appeals on the same matter; or [2] has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or [3] has decided an important question of federal law which has not been, but should be, settled by this court; or [4] has decided a federal question in a way in conflict with applicable decisions of this court; or [5] has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." (numbers added)

In our opinion, criteria [1], [4] and [5] may be excluded from consideration for we have found no other court of

appeals or Supreme Court decision with which the *En Banc* Decision is in conflict, and we do not regard the *En Banc* Decision or the Initial Second Circuit Decision as a far departure "from the accepted and usual course of judicial proceedings" which calls for Supreme Court supervision.

An argument could be made that there is an important question of federal law which should be settled by the Supreme Court within the meaning of criterion [3] in that the alleged fraud of Messrs. Young and Purcell which Judge Friendly attributed to Mr. Allan P. Kirby constituted a fraud on the federal district court in *Breswick* v. *Briggs*. To obtain a writ on that basis, four justices of the Supreme Court (that being the number of justices who must vote in favor of hearing a case in order for a writ of certiorari to be granted) would have to be pursuaded that (a) there is merit in Judge Friendly's novel conspiracy-attribution legal theory, *and* (b) the matter is of sufficient importance to be heard. We are doubtful on both counts. Furthermore, although the point was raised several times in the Alleghany briefs, none of the three opinions in the Initial Second Circuit Decision refers to any fraud on the *Breswick* district court.

It could also be argued that the case falls within criterion [2] on the theory that an important state question had been decided in conflict with applicable state law. This argument would center around whether the evidence allegedly not disclosed by Messrs. Young and Purcell would "*probably*" produce a different lower court result if it had been disclosed. This is the standard used by Judge Moore in the Initial Second Circuit Decision. There is some authority in New York State law (one Appellate Division, 3rd Department, case, and one Surrogate's Court case, but no New York Court of Appeals case) which could be construed to mean that the proper test is whether the undisclosed documents "*might*" have produced a different result. It could thus be argued that Judge Moore incorrectly interpreted New York law by applying the "probable" rather

than the "might" standard. We do not consider this argument likely to obtain the grant of writ of certiorari for three reasons. First, there is no certain conflict between Judge Moore's opinion and New York law, for it cannot be said with assurance that the "might" theory is settled New York law. Second, assuming arguendo that there is a conflict, we are not convinced that the question is of sufficient importance to induce the Supreme Court to undertake a review. And, third, even Judge Friendy in an opinion which seemed to bring to bear every weapon in his legal arsenal did not dwell on the issue whether Judge Moore's opinion was in conflict with state law.

In view of the foregoing and after considering a statistical analysis of the numbers and categories of cases in which petitions for certiorari have been granted, we are of the opinion that the likelihood of the Supreme Court granting a writ in this case is remote. We consider the case to involve primarily an evidentiary question of a nature in which the Supreme Court rarely grants certiorari. However, the granting of certiorari being a matter of discretion of the Supreme Court, the possibility of a grant in this case cannot be ruled out. A fair appraisal must also recognize that the four to four division of the *En Banc* Decision is likely to attract more than ordinary interest among the Supreme Court Justices.

Factors to be Weighed in Deciding Whether to Petition.

If a writ of certiorari were granted, and if Alleghany were successful in each of the ensuing stages of litigation, there would be a potential recovery which has been estimated to amount to as much as $60 million. Since the amount spent in petitioning for a writ would be modest when compared with the expenses incurred by Alleghany thus far in the litigation and minute in comparison with the estimated maximum potential recovery, this additional step has a

definite appeal. A "running out the string" approach is also attractive, for if certiorari were denied the Board could nevertheless feel confident that it had exhausted every possible prosecutory effort.

However, the granting of certiorari and a reversal of the courts below by the Supreme Court would not end this litigation nor assure Alleghany of a worthwhile recovery. It could be the beginning of another long and expensive course of litigation which, in the absence of a settlement, would not end until either one of the multiple stages hereafter referred to was unsuccessful or there was an ultimate determination, sustained by further appeals, in favor of Alleghany. Assuming uniform success, this could involve a district court trial where Alleghany would seek to have the settlement in *Zenn* v. *Anzalone* declared a nullity or to enjoin Mr. Kirby from pleading that settlement as *res adjudicata,* appeals from the district court decision, a trial on the fairness of the 1950 exchange transaction in which Alleghany would hope for not only a favorable legal determination but also a favorable valuation in the complex realm of damages, and appeals from that trial court decision. The granting of certiorari and a reversal of the lower courts by the Supreme Court could also involve litigation against the Young Estate and Mr. Purcell which the Alleghany Board would be obliged to consider if the Supreme Court adopted Judge Friendly's theories, for he considered Messrs. Young and Purcell active participants in the alleged fraud as contrasted with his acknowledgement that personal dereliction on the part of Mr. Kirby was not established. In the absence of a settlement all of this would have to occur—and occur successfully—before Alleghany could realize recoveries beyond that already recovered in the settlements in *Zenn* v. *Anzalone.*

We emphasized at the outset of this opinion that we were not in a position to render an informed judgment on the merits of this litigation. We can observe, however, that no one can forecast with assurance that Alleghany will ultimately prevail in all the stages referred to in the

preceding paragraph or, indeed, in any one of them, nor can one forecast with accuracy what the amount of the ultimate recovery for Alleghany would be assuming consistent success.

Possible Liability of Alleghany Directors if Petition Not Authorized.

In our opinion the disinterested directors may properly consider the foregoing matters in arriving at their decision whether to authorize a petition for writ of certiorari. It is proper for them to consider the probabilities of a grant of certiorari and to weigh the potential of an ultimate multi-million dollar recovery against the prospects of continued (and possibly long and expensive) litigation in which there can be no assurance of success. A further factor which may be appropriately considered is that notwithstanding skillful and vigorous prosecution for over four years, no success has yet been achieved. On the other hand, one cannot summarily reject a forecast of ultimate recovery in view of the equal division of the En Banc Decision.

In our opinion, if the best judgment of the disinterested members of the Board exercised with due care and in good faith results in a decision to authorize a petition for a writ of certiorari, no liability could be asserted successfully against the participating directors. It is also our opinion that if similarly exercised best judgment reaches the conclusion that all reasonable efforts to prosecute the litigation have been made and that further expenditures of money and executive and board time are not justified when balanced against the prospects of eventual success, a decision not to authorize a petition would not subject the participating directors to personal liability.

Very truly yours,

Willkie Farr Gallagher
Walton & FitzGibbon.

[3675-3730]

Hearing and Opinion Below.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

ALLEGHANY CORPORATION,
Plaintiff,

vs.

ALLAN P. KIRBY, *et al*
Defendants.

60 Civ. 3511

New York, April 9, 1965

Before:

Hon. SYLVESTER J. RYAN,
District Judge.

STENOGRAPHER'S MINUTES

SOUTHERN DISTRICT COURT REPORTERS
United States Court House
Foley Square 7, New York
Telephone COrtlandt 7-4580

Hearing and Opinion Below.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ALLEGHANY CORPORATION, Plaintiff, *vs.* ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR. and FRED M. KIRBY, Defendants.	60 Civ. 3511

Before:

Hon. SYLVESTER J. RYAN,
District Judge.

New York, New York,
April 9, 1965,
11:30 P.M.

Appearances:

WILLKIE, FARR, GALLAGHER, WALTON & FITZGIBBON, Esqs.,
Attorneys for Plaintiff,
MARK F. HUGHES, Esq.,
VINCENT R. FITZPATRICK, Esq. and
ALLAN CONWILL, Esq., of Counsel.

DONOVAN, LEISURE, NEWTON & IRVINE, Esqs.,
Attorneys for the Defendants,
WALTER R. MANSFIELD, Esq.,
JOHN E. TOBIN, Esq. and
WALTER J. STRATTON, Esq., of Counsel.

TOWNLEY, UPDIKE, CARTER & RODGERS, Esqs.,
Attorneys for the Intervenors,
J. HOWARD CARTER, Esq.,
LEE W. MEYER, Esq. and
RONALD S. DANIELS, Esq., of Counsel.

Hearing and Opinion Below.

The Court: Now I have before me, gentlemen, an order to show cause which I signed yesterday after telephoning both Donovan, Leisure, Newton & Irvine and later Mr. Hughes. Is everybody ready to proceed on the merits of this now?

Mr. Hughes: We are.

The Court: It was brought on at rather short notice because of the urgency of the situation. I appreciate your lawyers' concern that it be done so that you can have a ruling promptly.

Mr. Hughes: Your Honor, before Mr. Carter proceeds, I thought we should file with you a copy of a letter which we have from Mr. Deer which is our authority for appearing here. There has been no formal substitution of attorneys and Townley, Updike & Carter is still attorney of record for the plaintiffs, but we felt that you should have before you a written indication of our authority to appear for the company through these independent directors.

The Court: Well, I don't know. Who is Mr. Deer?

Mr. Hughes: Mr. Deer is one of the independent directors who voted not to proceed with a petition for a writ of certiorari.

The Court: Whom do you appear for on this order to show cause?

Mr. Hughes: For Alleghany Corporation.

The Court: For the corporation?

Mr. Hughes: As a result of the action of these directors in authorizing us to appear.

The Court: I will take it then with the consent of Townley, Updike, they withdraw as attorneys of record for Alleghany Corporation.

You have been paid in full for your services, have you?

Mr. Carter: Yes, we have.

The Court: And that your firm, Mr. Hughes, Willkie, Farr, Gallagher, Walton & FitzGibbon, are now the attorneys appearing for the Alleghany Corporation?

Mr. Hughes: That is correct.

Hearing and Opinion Below.

The Court: Mr. Mansfield, whom do you represent?

Mr. Mansfield: We were counsel for the defendants in the original action and continue to be counsel for the defendants.

The Court: That is the individual defendants, Kirby, Phillips, Ireland?

Mr. Tobin: We represent Mr. Kirby and Mr. Ireland and Fred M. Kirby.

Mr. Meyer: Mr. Phillips is out of the case since no appeal was taken from the dismissal as to him.

The Court: And you are appearing, Mr. Carter, for the two—suppose we call them—petitioners, Margaret L. Holt and Kathleen L. McMahon.

Mr. Carter: That is correct, sir.

The Court: All right.

Now let me hear you first and then I thought the best way would be, if agreeable to everybody, we will hear from Mr. Carter on behalf of the petitioners and then we will hear from Mr. Hughes in behalf of the corporation, and then from you, Mr. Mansfield, or from your partner, Mr. Tobin, on behalf of the individual defendants.

Is that agreeable to everybody?

All right.

Mr. Carter: Judge Ryan and distinguished counsel:

In all frankness, until I think it was Monday of this week, I had believed that this long drawn-out litigation, which is familiarly known as Alleghany vs. Kirby, would probably have a decent interment.

The Court: Apparently it has had the interment but you want to disinter the body.

Mr. Carter: But along came these proposed intervenors who, incidentally, are sisters, Mrs. Holt and Miss McMahon by proper name, and asked us to file this motion seeking permission for them to intervene for the purpose of filing a petition with the Supreme Court for a writ of certiorari.

Hearing and Opinion Below.

Now I suppose everyone is bursting with curiosity to find out how Townley, Updike inherited Mrs. Holt and Miss McMahon, and there isn't any secret about it.

The Court: I don't see that it is pertinent but idle curiosity might just as well be satisfied, including the Court's curiosity.

Mr. Carter: I think that is probably right, Judge, and that is my motive in disclosing the genesis of our present relationship.

These women, as their affidavits indicate, for a number of years, certainly during the period in question, have owned a substantial amount of Alleghany preferred and, incidentally, they are and have been friends of a man named Tony Smith, who is pretty well known to most of us, who has been a director of Alleghany for many years, and it was through Mr. Smith's counsel and advice initially that they purchased this Alleghany stock for, as I say, investment.

The Court: Well, they got it for a good price in those days. Mr. Smith gave good advice when he told them to hold on to it.

Mr. Carter: And they appear to be knowledgeable young women and have followed the fortunes or ill fortunes of the Alleghany Corporation through this litigation with pretty close attention. They are very close friends of the mother of one of our young associates, Richard Barnes by name, and apparently last Sunday, in the course of a social visit with Mrs. Barnes, they were discussing the current status of the Alleghany situation and were told by Mrs. Barnes, who has also some familiarity with the matter, that the Alleghany board had decided not to authorize the filing of a petition for writ of certiorari, which led them to make further inquiry, and the net result of these discussions, which were participated in to some extent by Richard Barnes, is that they came down and asked us to bring this petition on their behalf.

Hearing and Opinion Below.

Now it would appear, for reasons that I will acquaint your Honor with very shortly, that these two proposed intervenors are in the same category of a number of other shareholders of the corporate entity, who can be multiplied by the number that presently exist in their lack of knowledge as to the action which the enfity, through its board of directors, took in failing to authorize the filing of a petition for a writ after the four-to-four decision of the Second Circuit in February of this year.

Now, I will be very brief, your Honor, and I know that you have read these supporting papers.

The Court: So that all counsel may be informed I not only read the supporting papers but before I went to the dentist yesterday afternoon—I am having some root canal work done—I examined some of the cases on this subject and then I asked my two able law clerks to continue the research and had the result of their research on this table this morning.

They worked until the late hours of the evening and when I came in this morning at eight o'clock I examined the cases they had gotten out for me, and their notes, so I feel that I am somewhat familiar with the law applicable to the situation presented here by this order to show cause.

Now, so we can orient this matter and bring it down to the fine point of what I regard the issue here to be, you are moving under Rule 24(a), subdivision 2?

Mr. Carter: That is right.

The Court: Which reads that "upon timely application"—note the word "timely"—"anyone shall be permitted to intervene in an action when the representation of applicant's interest by existing parties is or may be inadequate and the applicant is bound or may be bound by the judgment in the action."

Now I don't think there would be any dispute but that these petitioners or applicants will be bound by the judgment in this action.

Hearing and Opinion Below.

I think the question here is whether or not, No. 1, the application is timely; and, No. 2, whether or not the representation of the applicants' interests by the existing parties is or may be inadequate.

Those are the two matters that are presented to me. If I find that the application is timely and I find that applicants' representation by the existing parties is and will be inadequate, then your application must be granted. If I find that your application is untimely or that the representation is or may be adequate, your application must be denied.

Now you go ahead. Address yourself first to the timeliness of this application.

Mr. Carter: Yes. In order to do so I think I will have to acquaint your Honor very briefly with part of the factual background.

The Court: May I interrupt you a moment?

I think that I should state for the record that this matter come on before me as chief judge and I am taking this over because it was assigned to our late brother, Judge Dawson, and I have been taking over all uncompleted matters in an endeavor to handle them myself, if I can; otherwise to reassign them to another judge.

I felt when this matter came in yesterday that this was a matter that I could conveniently handle along with my other duties and for that reason I retained this matter before me.

Mr. Carter: Well, very briefly, Judge, when this litigation was initiated 'way back in 1960, the fall of 1960, the plaintiffs were the Murchison brothers whom we represented, and, in a sentence, they were seeking to set aside settlements that had been consummated in derivative actions which were brought by dissident stockholders on behalf of Alleghany against Mr. Kirby and Mr. Ireland and Mr. Phillips and others, on the broad, general ground that the settlements were fraudulent and corrupt.

In addition, the rationale of one phase of that initial lawsuit had to do with a breach of fiduciary relationship or a claimed breach of fiduciary relationship on the part of Mr. Kirby and others, who, at the time in question, had control of the corporate entity.

Now, as your Honor has stated, it was a Rule 2 case and was assigned to our late lamented and revered friend, Judge Dawson, for all purposes. To skip very rapidly, during the extended interrogations and examinations before trial and discovery proceedings, which I am sure were much too extended and annoying to everybody——

The Court: I think Judge Dawson commented upon 20,000 pages.

Mr. Carter: That is right, and Judge Dawson expressed much displeasure about the length of those depositions; but, in any event, history now indicates that the Murchison Brothers, who were then the plaintiff, succeeded after a proxy contest in obtaining working control at least of the corporate entity, and Judge Dawson quite properly suggested that since they were then in control, that Alleghany be substituted as the plaintiff in that litigation, which was eventually done.

Now, I am going to skip right down to the trial of the law suit—

The Court: I have read Judge Dawson's opinion reported in 218 Fed. Sup. 164.

I have read the Court of Appeals opinion reported in 333 Fed. 2d 327, and the subsequent per curiam reported at 340 Fed. 2d 311.

So you can assume that by reason of that, I am fairly familiar with the background, and besides, I had contact with the case and know something about it because I had examined the file when I designated a Rule 2 judge. But this was originally filed as a diversity derivative stockholders suit.

Mr. Carter: That is correct.

Hearing and Opinion Below.

Now, after Judge Dawson dismissed the complaint, an appeal was taken to the Second Circuit; and, as I recall it, it was argued before a panel of three judges sometime in December of 1963.

In the meantime, for reasons that are not germane to this issue, the Murchisons decided they would get out from under so far as Alleghany was concerned, and eventually Allegheny returned presumptively to the control of Mr. Kirby.

The two-to-one panel decision affirming Judge Dawson's dismissal of the complaint came down sometime in the spring of 1964, and I believe at or about that time Mr. Kirby was back in control of the corporate entity.

We suggested, Townley, Updike suggested, that because of the magnitude of the sum involved and the dissent, the strong dissent by Judge Friendly, that a petition for a rehearing en banc was in order, and Mr. Updike and myself were invited down to the Alleghany offices to appear before the new board of directors, which was presided over by Mr. Kirby. I would say he was most gracious. There were probably twenty-five members of the board in the room, and they questioned both Updike and myself on the need and advisability, and the reasons why a petition for a rehearing en banc was in order. To sum it up, they voted unanimously in the presence of Updike and myself to authorize Townley, Updike to file such a petition.

That was done. The matter was briefed in extenso, and, as your Honor knows, the Second Circuit came down, I believe it was in late January or early February of this year, and split four to four.

The Court: When you speak of Mr. Kirby, do you refer to one of the defendants, Allan P. Kirby?

Mr. Carter: That is right.

The Court: So he voted in your presence to authorize the filing of a petition en banc in this suit in which he, himself, was a defendant?

Mr. Carter: That is correct, sir. And I might add that that vote of the Alleghany board at that time authorizing the filing of the petition was unanimous.

When the four-to-four decision came down from the Second Circuit, Alleghany, through Mr. Ireland who is presently the president of the entity, asked for a written opinion by Townley, Updike as to what further steps should be taken in view of that stalemate. That letter was carefully prepared and sent to Alleghany, and I believe the members of the board, and it is a matter of record. In a sentence, we urged Alleghany to file a petition for a writ of certiorari because of (a) the stalemate in the Second Circuit, and (b) the huge amount of money at stake, which would inure to the benefit of the Alleghany shareholders, and (c) the lack of expense involved in filing such a petition.

We were careful to point out to them that, in our judgment, a pretty big hurdle would have to be accomplished before the Supreme Court would grant that writ, but at the same time we were also careful to tell them that, in our considered judgment, if the Supreme Court undertook to hear this issue on its merit, that we thought that there was an excellent chance that they would send it back, remand it for a new trial, enunciating strong standards which must be followed in fiduciary relationships, particularly as they apply to this case.

We understand that at or about that time, the Alleghany board, as certainly was its right, retained the Willkie, Farr firm for the purpose of getting independent advice.

Now, I don't profess to have any knowledge of the advice that was rendered by the Willkie, Farr firm, and frankly I don't know that it is any of my business, although Mr. Deer has indicated that Willkie—

The Court: Gentlemen, don't carry on private colloquy. I have a certain aversion to it.

Mr. Carter: Yes.

The Court: One of my peculiarities.

Mr. Carter: Mr. Hughes tells me that that opinion of Willkie, Farr is attached to their answering affidavits, which I have not yet seen. So, in any event, it will speak for itself. As I say, it is of no great moment.

But thereafter, sometime after certainly their opinion letter was written to the Alleghany board, we were advised by phone, and I think it was Jim Deer who called, who incidentally is a board member of Alleghany, that—

The Court: I see by his affidavit he is also a member of the bar?

Mr. Carter: Yes, that is right. —that with Mr. Kirby and with Mr. Ireland and possibly others who had some interest absent from the board room and not obviously participating, the board, the Alleghany board, had voted not to authorize a petition to be filed.

We asked them to inform us in writing, which they did.

Now, that was sometime I guess in February or March, I don't know, and there is where the matter stood until Mrs. Holt and Miss McMahon appeared upon the scene.

Now, one thing, your Honor, on the timeliness of this petition, which I think is of great moment, is the fact that, so far as we know—and I think it is the fact—the entity or the Alleghany board at no time either publicly or through the mails advised its shareholders of its decision not to proceed further in the litigation through the medium of authorizing the filing of a petition for certiorari. I have no idea how many shareholders there are in Alleghany Corporation, and I am not even taking the position now that, as a matter of law, the entity had an affirmative duty to either publicize their decision or notify shareholders of what that decision is, but the fact is that in the exercise of their discretion, the directors did not notify the shareholders. And it certainly came as a surprise to these two proposed interveners, as I am sure it did to others who have substantial equities in this corporation, that they decided, in their judgment, not to authorize the filing of this petition.

Now, the rationale of it—and I am only just thinking out loud here and without resort to any great abstract principles—but retrospectively, here is a company through its board of directors, who, as I said before, very gratiously authorized the filing of a petition for rehearing on this matter en banc. That was done. Thereafter, obviously, a court widely split on a four-to-four basis.

There are all kinds of estimates bandied about as to the amount of the eventual recovery to the shareholders in the event this lawsuit is prosecuted successfully, and figures of forty, fifty and sixty million dollars have been mentioned, but what I don't understand—and I don't say this in any critical spirit at all—is why the directorate of Alleghany didn't remain consistent and authorize the filing of a petition after the four-to-four split, particularly in view of the fact that the expense, all of the expense, had previously been incurred, and the expense involved, as we told them in the letter, for filing a petition would be minimal.

The Court: Perhaps the answer might be found in the opinion, a paragraph of Judge Dawson's opinion deciding this case, in which he referred to this suit as "but another skirmish in the battle of tycoons, Murchison Brothers of Texas on one side and Allan P. Kirby of New Jersey on the other, for control of a rich plum, Alleghany Corporation."

And perhaps they thought that, while they might be prompted in a motive for fighting Murchison Brothers, they have no reason to engage in a skirmish with themselves.

Mr. Carter: Here is what I--

The Court: You like to think out loud, and so do I. Let me do a little thinking out loud, and it may help.

Mr. Carter: Certainly.

The Court: As I read through these opinions, I was first struck by the opening paragraph of Judge Moore on the appeal reported at 333 Fed. 2d 327. Judge Moore

starts in, "For some ten years the subject matter of this lawsuit or the lawsuit now on appeal has been before the New York State and Federal Courts."

Now then, following that, I read—I started in perhaps in the inverse order; I should have read the learned opinion of my beloved brother, Judge Dawson, first, but then I read Judge Dawson's opinion, and I was struck with this situation. Here is a corporation where the funds are publicly invested funds that come from the people at large, and the board of directors, irrespective of their personal ownership, they control far less than the majority of the issued stock and they are trustees for public funds.

Now, where you have a corporation such as this, Alleghany, with its checkered background through the years, in the days of the Depression, and it has been involved in litigation for ten or twelve years, I wonder whether it isn't about time that this litigation should be terminated in the interests of the investors, the public who put their money in these companies, rather than have it go on forever.

I don't know whether this Alleghany Corporation needs any financing or not, or whether it has enough monies to operate without additional stock issues or bond issues or what ventures they may be involved in, but you can't close your eyes to facts of common knowledge.

I recall at one time this corporation or somebody affiliated with it bought a substantial share of the stock of the New York Central Railroad. It is common knowledge that negotiations or proceedings are pending looking towards a consolidation of that road with Pennsylvania Railroad, possibly of the combined corporation taking over the freight aspect of the whole New Haven Railroad, and all of these things lead one to believe that as soon as this battle between the so-called tycoons over who should have control of somebody else's money, particularly funds of the public, terminates, the better off it will be for the public. And that is my first impression of this business.

Hearing and Opinion Below.

Now then, as I read the cases and I read the decisions, it appears that this suit was originally filed as a derivative stockholders diversity suit, and that it brought into question a settlement which had been passed on by the New York State Supreme Court over here in New York County. And it was alleged as a basis of the relief sought here in this particular suit now before us that a fraud had been perpretated by Kirby and his associates in the accomplishment and the securing the approval of that settlement by the State Supreme Court. Those issues have been adversely determined.

Now, thinking over this problem further, I know—I feel quite sure and if I am in error, you can correct me—that while this settlement over in the State Supreme Court was pending, notice went out to all the stockholders of the contemplated settlement. That is the statutory procedure both in the State Court in a suit of this nature, and frequently in this court. These settlements cannot be accomplished without appropriate notice, due notice.

So that your petitioners must have known of the existence of this suit over in the State Court and must have had notice of its pendency and of the proposed settlement.

Now, the record shows, as I see it, that some stockholders did appear and did object to the settlement over in the State Supreme Court, but among those objecting stockholders were apparently not your clients. So they were content to leave matters go along without intervention, and they didn't intervene.

Now then, when this suit was filed, I assume that enterprising entrepreneurs, such as you represented then, Murchison Brothers, must have in their reports to the stockholders while they were in control of this company, advised the stockholders of the pendency of this suit in this court, which would bring into question the settlement which had been reached and which seems to have been approved in the State Court.

Am I correct in that?

Mr. Carter: I think so, generally speaking.

The Court: So your clients knew of this suit pending here and took no steps to intervene.

I don't know whether Murchisons later on, after Judge Dawson's decision, made a report to the stockholders advising them of the result and of the intended appeal, but I assume that again they did so advise, particularly since at that time there were conferences going on between the rival forces for control.

Am I correct in assuming that these stockholders, your petitioners, were advised of Judge Dawson's decision and of the appeal?

Mr. Carter: I would assume all stockholders were.

The Court: It would be fair to assume that.

Now then, going over the record here, can I say now on the eve of the expiration of the time to file a petition for writ of certiorari, that an application by your petitioner is timely made, particularly in view of the fact that you asked to intervene for the purpose of applying for an extension of time within which to file a petition for a writ of certiorari?

There is no undertaking here that they want to file or will file, and there I am confronted with the State decision, the State statutory provision about this being a derivative stockholders suit. A bond might be required; I don't know.

Mr. Carter: No, no final judgment.

The Court: Well, I don't know. I haven't examined that, but what this would mean, if your petitioners had the relief they seek granted to them, is that it would have this practical effect. It would mean that the time to appeal, to file an application for a writ, would be further extended. This writ would most likely not come up before the Court, the Supreme Court, before October, and it would mean that the affairs of this corporation, which have been the subject of litigation now for more than twelve years, would be continued and they would have that

uncertainty of management and uncertainty of the future going on for six months more.

Can I say that this application is timely? Now, I have grave doubts about it.

In fact, I have tried to keep my mind open on the subject, and I am thinking out loud so that you might address your future remarks to these questions that come to my own mind.

Now then, coming down to the second obligation that you have to show of your burden that you have to establish—that is on the adequacy of the representation—I can't find any case that holds that, as a matter of law, there must be representation after an affirmance on an appeal. I have looked at the various cases you cite in your order to show cause, and I and my able staff, very competent staff, if I may say so——

Mr. Carter: We agree.

The Court: —have been unable to find any holding on that, that says that adequate representation includes the right to appeal further by attempting to secure a writ of certiorari in the Supreme Court after an affirmance by the Court of Appeals.

I can't find any case on that, and I would be inclined to feel, as a matter of law, that had this application been timely made after Judge Dawson's opinion, you might well be entitled to intervene for the purpose of appeal. But now, on a possible action of the Supreme Court, I don't feel that, as a matter of law, you have a right to intervene now on the claim that you are not adequately represented.

Also on that, as you recite—you have been very fair in your affidavits, I must say that, as you always are—you say that Kirby and his associates have absented themselves from this vote when they voted not to file a writ of certiorari, and it also appears from that same affidavit that after Kirby and his associates came back into control of Alleghany, they did authorize an application for argument

en banc. That seems to me to be a very fair indication of adequate representation, and while you, as a zealous advocate, might not feel that a decision of the board of directors of Allegheny now made not to proceed further by filing a petition for a writ is wise, you cannot supplant your decision on business as well as legal matters for their own judgment and the advice they get from their own independent counsel.

The counsel that advised them on this is not the counsel of record, not Donovan, Leisure, who might also be influenced by the zealousness of their advocacy, but it is like bringing in an independent auditor, and Willkie, Farr and Mr. Hughes, a distinguished member of our bar, gave his independent judgment, and I can't say that this is not adequate representation as a matter of law.

These are problems I have, and if you would address yourself to those two problems, I would be very grateful to everybody here. Because of the urgency of this matter, I do not intend to write any opinion, and I have in mind that if any further action is taken with reference to my decision, that my observations and remarks made here at this hearing on the minutes will constitute such opinion as the Court might desire on any review.

Mr. Carter: Let me say by way of brief rebuttal——

The Court: It isn't a rebuttal so much. You proceeded the way I like to see a lawyer proceeding, expressing your thoughts, and as you did so, there was a subconscious expression of your doubts, which perhaps you did not detect yourself, but of which I know you are well advised, having tried many cases before a jury. A jury sometimes senses doubts, the advocate might have in the justice of his own cause, notwithstanding his vociferous protests to the contrary, and so, quite similarly, you put me in the position of a jury listening to a distinguished, able and experienced advocate.

Mr. Carter: Well, as your Honor knows, there is an entirely different approach between one to a judge and one to a jury——

The Court: Well, not essentially too different. Lots of people think it is different.

Mr. Carter: Well, with a judge we have to stick closer to the facts and the law than with a jury.

The Court: Well, judges like to think that they require that, but they are just as human as anybody else, and lawyers like to feel perhaps that is the way they address the Court, but they are human and they like to create atmosphere, too, whether they are talking to a jury or judge. But let's get back now and stop all this philosophizing.

Mr. Carter: I will be as brief as I possibly can, Judge.

The Court: No, no, I am not hurrying you. You take your time.

Mr. Carter: I appreciate the sentiments you have just expressed, and I think I have assimilated them, although I don't necessarily agree with them, for this reason.

Initially, Judge Dawson felt that when the Murchisons filed this lawsuit back in 1960, that this was sort of a gimmick for a proxy solicitation contest, and I think he inadvertently borrowed that expression from Randolph Phillips, whose principal cry was that this was just a gimmick. But for some reason Judge Dawson——

The Court: We might take judicial notice that he is quite an expert in gimmicks.

Mr. Carter: Yes. Judge Dawson adhered steadfastly to what I always thought was an illusion on his part, and the facts as they developed, insofar as the Murchisons' participation in this whole complex of litigation is concerned, bear out the inevitable conclusion that they were not using this lawsuit as a gimmick for a proxy contest primarily because after they had initiated one and were successful in acquiring control of Alleghany at a tremendous cost, involving many multiples of millions, for reasons best known to themselves, they decided they wanted out, sold their controlling interest to Gamble and others with, I am told, a net capital loss on their part of very, very substantial sums.

So that this was not of great importance to them, the fact that, to protect the record and I think the facts—

The Court: They might have overreached themselves with their financing.

Mr. Carter: In retrospect, I think in the vernacular, they took a bath in this thing; they paid out a lot of money, a lot of expenses; and they sold their stock for less than they bought it. So I don't think when one is knowledgeable with all of the facts during the period in question, one could properly maintain that this lawsuit initially was a gimmick and a proxy solicitation contest.

The Court: I don't take it that. I don't question the good faith of any of the parties. I have no reason to do that. I have to assume, and I do assume, that all acted in the best of good faith in various suppositions.

Mr. Carter: In all frankness, I don't think that is particularly germane to the problem.

The Court: No, but I assume that all acted in good faith.

Mr. Carter: I don't think it is germane now to the problem we are burdening your Honor with, but I wanted to address myself on the question of the timeliness of this application.

It is true, as your Honor said, that when the Murchisons came into control, they advised the shareholders of the status of the litigation which was then pending with, I suppose, the probabilities of success, and whatever burdens the law puts on controlling stockholders by way of informing shareholders of the litigation the entity is involved in—and obviously these two proposed interveners, who were shareholders at the time, were knowledgeable through these notices of the status of the litigation involving Alleghany, and I would assume that that continued even after the Murchisons relinquished control and Mr. Kirby got back control, and that these two women were knowledgeable as to what was going on.

Now, you see, I think this makes a strong argument for us in that during all of that period, these two women felt

that their fifty-odd thousand dollar investment was being protected, the matter was being actively litigated, and certainly they were apprised of the fact, I am sure, one way or the other that the Second Circuit split four to four, and I think it is fair to assume that when they got such a notice —and this would apply to all other stockholders—in view of the amount involved, that they must have concluded that Mr. Kirby's liability was a very close question of fact and law.

Now, this was the ninth inning so far as these proposed interveners were concerned in that from that point on, they heard nothing—and I don't say as a matter of law that the directorate of Alleghany had an obligation to notify all of its shareholders of its decision not to authorize the filing of a petition—but I do say on this question of timeliness when the directorate saw fit, in the exercise of its discretion, not to authorize the filing of a petition, I think it did have a corresponding duty to let its shareholders know of that decision. So far as these two proposed interveners are concerned, they were completely in the dark with respect to it, and when they heard about it, as I am told, for the first time on last Sunday, they decided to do what they could to protect their investment.

Now, to me, this is of some pertinence on the question of timeliness because I would assume that there may be hundreds, maybe thousands of other Alleghany shareholders, who would have reacted the same way as these two proposed interveners have acted, had they knowledge of the fact that the directorate of Alleghany had decided not to authorize the filing of this petition.

Now, that is obviously a guess on my part, but when you rationalize it—and this is again not rebuttal to something your Honor said a moment ago—here is a company that has spent a lot of money on legal fees. Townley, Updike was the recipient of some of that largesse.

The Court: I wouldn't say it was largesse. I think that any money that was paid you or your firm was earned.

Mr. Carter: We would like to think we earned it.

The Court: And the record shows that this was a very bitterly contested litigation, and it was also bitterly contested at the time of the argument en banc.

Mr. Carter: Yes.

The Court: And that notwithstanding the expense of this litigation, it would seem to me as indicative of adequate representation that the directors, including the defendants, voted to authorize an application for argument en banc, and that seems to me a very potent factor here.

Mr. Carter: In this argument here, I have tried to recognize that and tried to give those directors the credits which I believe was due them for that action, but here is where we part company, and it is at this stage I believe that the interests of these proposed interveners and others similarly situated ceased to be protected, because the directorate was knowledgeable of the fact that after the four-to-four decision came down, that the expense involved in filing a petition, so that this baby could be laid to rest with finality once and for all time, would be minimal. And it would appear to me that when they again, in the exercise of their discretion, decided not to authorize the filing of this petition despite the fact that it could be done with very little expense, they became inconsistent, they should have gone the whole way.

You take a fellow to lunch; it has always been my philosophy—don't let him buy his own coat back; go the whole way or not at all.

(Discussion off the record.)

Mr. Carter: But it seems to me that they could have gone the whole way just to prevent what your Honor is confronted with here this morning by two of maybe hundreds of shareholders, and I say that when they decided not to authorize the filing of this petition, this is when these proposed interveners ceased to be protected, and there would be no more expense involved I think whether

the petition would be granted or not, if we were to get a 60-day extension here, whether the petition could be filed certainly within that 60-day period, be acted upon expeditiously, and if the petition were denied, the ball game is over. If it were granted, then you have another problem, whether or not the Court would decide this on its merits and for what it is worth, and—this is only a guess—I think if the Supreme Court considered this matter on its merits, there would be a remand.

But now there is a big difference between that and getting to the Supreme Court, and as we told Alleghany, we have some doubts about our success in having the petition granted. But where there's life, there's hope.

The Court: Are you through?

Mr. Carter: Yes, sir.

(Discussion off the record.)

Mr. Hughes: May it please your Honor, I think the record already shows that I have submitted to the Court the letter authorizing our appearance.

I think the record also should show that we served our answering papers this morning and also left the originals of those papers with your Honor so that your Honor now has them.

Your Honor mentioned the fact that you had given this application some consideration and had read the moving papers, and you and your staff had undertaken some research.

We submitted the answering papers, including a very short answering memorandum, and I would like to inquire at the outset whether your Honor had an opportunity to read that memorandum. It is very short.

The Court: I only had the opportunity to read such portions as my staff had underlined. As you recall, I didn't come down from the prior hearing until shortly after half past eleven, and my staff apparently had received this memorandum before the hearing began. I had not seen it. It came in after I left to go up on a prior hearing.

They underlined, number one, "The moving papers do not suggest that the prosecution of the action through the Court of Appeals was impeded in any respect."

Number two, "The moving papers do not even suggest that the decision of the independent directors not to apply for a writ was the result of domination, corruption, fraud, dishonesty or any other venal purpose or motive."

Number three—I am reading you the portions they underlined—"On the moving papers, the fact that this decision was solely the result of the exercise of the judgment of the independent directors that a cessation of the litigation at this stage was in the best interests of the corporation stands undisputed."

Those are the three points that were underlined and the three points I read.

They also underlined that "The basis for intervention when allowed is inadequate representation by the board of directors. This in turn is established by a showing of domination, corruption, fraud or dishonesty, and no such showing was ever attempted here" and it cites a case. I am familiar with the case of Pyle-National Co. v. Amos, 172 Fed. 2d 425.

I also am fairly familiar with the other decisions. The Pellegrino decision I had occasion to read yesterday at 203 Fed. 2d 463, and the other citation, Wolpe v. Poretsky, 144 Fed. 2d 505, I am familiar with.

So that although I haven't read your memorandum in detail, I think I am sufficiently informed as to the substance.

Mr. Hughes: Well, yes. I might also add only that about the only thing——

The Court: It presents no new thoughts to me after our extended research.

Mr. Hughes: Yes. The only other aspect of the memorandum that I would like to call to your attention is that we cite the Swanson case as a single case because it seemed to us not only to express the law, but because it contained

a considerable discussion of the law generally and of other cases.

It seems to me that in view of your Honor's resume of what our brief said, that there is very little for me to say on the point of adequacy, except to point this out, that it is clear on the record that this decision not to proceed any further in the litigation was the result of action by a group of independent directors, who were both a majority and a quorum at the time they took their action. There is no question that their decision was honestly taken. It is not disputed, and the answering papers take the trouble to point out that this group of directors themselves either own or represent some 1,800,000 shares of stock having an aggregate value of some $20 million, so that although there is no attempt to indicate——

The Court: What is the outstanding number of shares?

Mr. Tobin: Approximately ten million, your Honor.

The Court: They represent about 18 per cent?

Mr. Hughes: Yes, that would be right, your Honor, and while there has been no attempt to characterize them as dummies, they certainly are not, and they not only acted according to their best judgment, but their affidavit indicated some of the reasons that motivated them, and in a nutshell, your Honor, it is that those people who are independent of this power play are just fed up, literally fed up with litigation, and they want an end of it, and they don't want any further litigation expense. They want this company to get back to the place where its management can operate its affairs, and where this long period of ten years of litigation is permanently laid to rest.

That decision that they made constitutes the decision of the corporation, and I submit to your Honor that, as a matter of law, these ladies—and I understand they are elderly ladies, and not young ladies——

Mr. Carter: Give them the benefit of the doubt.

(Discussion off the record.)

Mr. Hughes: I say that what these ladies really are trying to do is to interpose their wishes that this litigation proceed against the wishes and the determination of the board of directors, and I say they may not do that as a matter of law. They may not do that.

They could have come in, and obviously they weren't able to because the facts were against them. They could try to come in and charge these directors acted in some dishonest way, but they didn't. They acknowledged that is not so. And that is the end of it.

The corporation, having decided to drop this litigation, they simply cannot interpose their judgment or attempt to substitute their judgment or ask your Honor really to substitute his judgment by granting this application for the judgment of this board, carefully considered and carefully taken.

The Court: At this stage of the litigation, I agree with you.

Mr. Hughes: Well, I won't press that point any further, and on the question of timeliness, your Honor certainly has said everything on timeliness that needs to be said except for this. I wish I had brought these papers with me, but I didn't. Not only were these notices given, which your Honor refers to, but this whole litigation had widespread publicity, and one of the first things that Mr. Carter said in describing these young ladies is that they were interested in the affairs of this corporation. He said that almost the second or third sentence in his opening remarks, that they were interested in this company and were interested in its affairs and followed its affairs.

Now, if that be so and if they read newspapers at all, and if they are now so agitated about this—they must be pretty sophisticated young or old ladies—they must have seen a lot of the publicity about this case that appeared in the New York Times, in the Tribune, in the Wall Street Journal; in fact, all of the periodicals at every stage of the litigation.

When it comes to any duty on the part of the board to circularize a notice to stockholders that they have decided not to apply for a writ, there is absolutely no such duty. And why should they? Having made the decision not to go forward, that was the end of it. There was no occasion to send a notice a minority stockholder to invite them to come in to do the very things belatedly which these ladies are now doing. There was simply no burden on them to do that, so I submit, your Honor, that both as a matter of law, under the rule, they are not entitled to intervention as a matter of right, and I also submit that the application is not timely.

I had expected to allude to such problems as security and that sort of thing, but I don't think I will because in view of the turn the argument has taken, it does not seem to me that is a matter of importance now except it seems to me these two ladies must realize—and I am sure they were told this—that continuing this litigation is going to be a very expensive business, and for the life of me, I can't understand why, with this small investment, at this stage, they are undertaking this kind of a potential expense to themselves with certainly serious risks that they will never be successful, and that they are going to have to stand the freight.

So it seems to me that both as a matter of law and on the basis of timeliness, the application should be denied.

The Court: Mr. Mansfield or Mr. Tobin.

Mr. Mansfield: Your Honor, I have some very definite ideas, but I think that John Tobin, who has lived with this much longer than I have, could perhaps explain it better.

I would just like to say that, as is typical of Mr. Hughes or characteristic of him, as a member of his firm, he has been rather modest on the issue of adequacy of representation in refraining from describing his own very important careful study of this situation back when they were retained by the independent directors to give view on this very issue.

Hearing and Opinion Below.

Attached to Mr. Deer's affidavit in opposition is a rather extensive and thorough opinion letter from the firm of Willkie, Farr, which certainly made it clear that the independent directors, as they later did, were entitled to exercise their own independent judgment for good sound business reasons in reaching this decision, and if there were anything wrong—and there is nothing really charged so far as their personal behavior is concerned here—then, of course, these two young ladies would have an independent remedy available to them elsewhere. But that is not claimed, or at least there is no suggestion of something wrong.

I think the only other point I would want to make is that we have to look at this in perspective. Even Mr. Carter has said that he would consider the granting of certiorari to involve quite a hurdle here, so that on the issue of timeliness, it would hardly seem fitting for the board to expect that they had to go into detail with the stockholders, which they would have to do, once they raised this question of whether or not to file a petition for certiorari. When you consider what Mr. Carter himself has said, it would only be appropriate for the board whose duty it is to make this kind of a decision, to then turn around and start to spell it out in detail, when there would be no particular point in doing so in some communication with stockholders.

Now, John Tobin is far more acquainted with this than I am, and I would appreciate it if there is anything that he wants to say on this, if your Honor will listen to him.

The Court: It is not my policy to hear two lawyers for the same client, but there are a number of defendants here, and we will hear Mr. Tobin.

Mr. Tobin: Thank you, your Honor. I only want to speak very briefly on the adequacy point.

I may say that that has been a matter of concern not only to the independent directors, but to the defendants as well, because they do represent in their capacity as presi-

dent and chairman of this corporation, all of its stockholders.

Your Honor has already referred to the fact that this case, from the standpoint of the public stockholder, has been given every consideration throughout. It was very carefully worked out that the original appeal of this case was argued to the Second Circuit before Mr. Kirby came back into control.

When the question of reargument was presented to the board, Mr. Updike and Mr. Carter appeared before the board. They were fully heard. The board unanimously voted, including the defendants, to authorize reargument.

After the Second Circuit affirmed on reargument, the independent directors went to the Willkie firm, as they had on the reargument question itself. The Willkie firm's prior connection with this corporation had been one occasioned by the original plaintiff in this action, Murchison Brothers. So that it is clear, as your Honor has noted, that there has been a very determined effort to insure that the public stockholders were adequately represented with respect to this case.

Another aspect of the life of Alleghany to which your Honor has already directed attention is the fact that this is a corporation which has been involved in controversy and litigation for years. Today for the first time, it has on its board public stockholders who represent substantial amounts of money not belonging to some person temporarily or permanently in control of the company. These public corporations which have invested in Alleghany are represented on the board together with other public stockholders by a majority of the board, and it is those nine men who have made this decision that they are fed up with litigation, they would like this corporation to go on and do its business, and they are satisfied on the basis of their investigation and the actions of all of the courts here, that this litigation should now end.

The Court: Do you want to say anything further, Mr. Carter?

Mr. Carter: I don't think so, Judge. Maybe Mr. Meyer has a thought that he could get off his chest very briefly.

The Court: All right.

Mr. Meyer: Your Honor, I think there are two points to be made.

First, as to the adequacy of the representation, the fact remains that no matter what we hear of the independence of the members of the board, that Mr. Kirby has the power to nominate and elect that board. He owns in excess of 42 per cent of the stock personally.

His lawyer, Mr. Whittlesey, a partner of Mr. Mansfield and Mr. Tobin, stated in an affidavit to the Second Circuit that he, Mr. Kirby, was being returned, direct control was being returned to Mr. Kirby, and under those circumstances it would seem that, as far as the adequacy of the board decision is concerned, we don't question the integrity of the men involved, but we do have the fact that the litigation is again in a posture of Mr. Kirby being on both sides of it, 40 per cent owner in the corporation and the corporate claim is going by the board.

Now, Judge Friendly took note of this fact, and in the last sentence of his opinion in dissent in the Second Circuit, he stated that:

> "I would therefore reverse the judgment dismissing the complaint and, as the defendants should have an opportunity to meet the evidence that was erroneously excluded, remand for further hearing. Since Kirby has regained control of Alleghany, I would instruct the judge to make provision for the continued prosecution of the action free from any control by the present directors."

The present directors that Judge Friendly had reference to are the very same directors who are represented here by Mr. Hughes. The board directors are the same.

Now, as to the timeliness of this application, these ladies up until the petition for certiorari were adequately

represented. This litigation started in 1954, the underlying litigation started in 1954.

There was a proposed settlement. There was an objection to that settlement. The settlement was consummated and then it was attacked as having been fraudulently arrived at.

Then Alleghany itself took over the litigation and prosecuted the action and then the board of directors voted to appeal, and again voted for rehearing.

Now the considerations have not changed, and I think it is fair to question the basis for the decision of the board of directors, although you don't need to do so because of Mr. Kirby's stock ownership. The basis of the considerations that were present when a rehearing was voted was a two-to-one decision adverse to the corporation. Since that time the corporation's posture has improved. It is now four-to-four.

So one wonders whether or not the basis of decision was solely on the fact that we now want to end this litigation once and for all. There has yet to be an airing in a court of the basic claim involved here. The basic claim goes all the way back to 1949 and it has never been litigated in a court of law.

There have been settlement hearings on it, and this whole litigation has been a prolonged effort to try to litigate that claim on the merits.

There are at least four judges of the Court of Appeals that think that Alleghany has $61 million coming out of that claim and that Mr. Kirby is liable for it.

I think the opinions of the Court of Appeals make it clear that the issue here is whether the corporation is finally to get to litigate that claim on the merits and up until now this case has been an effort to do that.

And now when Mr. Kirby again is in control of the corporation with the stock ownership and the power to nominate or fire these directors, I don't think it can be said, as a matter of law, that the representation is clearly adequate.

Hearing and Opinion Below.

The Court: Well, are your applicants entitled to representation at this stage of the litigation after an affirmance on appeal? Can you cite me one case where intervention was permitted after an affirmance on an appeal?

Mr. Meyer: I think, your Honor, that since the Pellegrino case is perhaps as far as any case has gone in this matter, that you probably should not decide that the corporation or that the shareholders coming in now have no right to intervene, to go forward, to appeal. Now, Pellegrino admittedly involved a Court of Appeals situation. We are here concerned with an extension of that to the Supreme Court situation.

But if you deny this application, the right is gone and it seems to me that the very least that can be done by this court to protect the shareholders—and we suggest that they do have intervention as a right situation—that the very least that you can do to protect the shareholders and all others similarly situated is to grant them intervention for purposes of applying for an extension of time and we will attempt to air this matter in the Court of Appeals, as to whether or not they should be allowed to intervene as a matter of rights.

If you deny it flatly, the right will be gone in the Supreme Court of the United States because it is a jurisdictional matter.

The Court: You can appeal from my decision and I am going to give you a decision right away.

Mr. Meyer: The problem is that we would have to file an application for an extension of time by Monday.

The Court: I think you can go right upstairs to the Court of Appeals now and ask them for any relief you want.

The matter was presented to me yesterday morning. With the consent of all parties I gave counsel an adjournment on the hearing, or they consented that it be put on today. I was willing to hear the matter yesterday. I have heard it now. I am ready to decide it now and will file my

opinion, and you can take it right up to the Court of Appeals now.

> I would feel much happier if you did that. I will endorse the papers in this manner: "Because of the urgency of the situation presented by this application, I have written no opinion."

To sit down and write an opinion, it is going to have to be about ten pages, even five pages boiling it down, and it would have to be typewritten, and you wouldn't get it filed until tomorrow or maybe Monday.

I am giving you a decision now. I am endorsing the papers:

> "Because of the urgency of the situation presented by this application, I have written no opinion. See reporter's minutes of hearing held. I find and conclude that the within application is not timely made and that the applicants have had and do have adequate representation. This application is denied. So ordered."

Now that gives you an opportunity to go right upstairs. Maybe counsel will accommodate you and accompany you. If you are going upstairs, I will have the clerk take these papers right upstairs with you.

Do you desire me to do that?

Mr. Hughes, are you willing to go up with Mr. Carter?

Mr. Hughes: Yes, your Honor.

The Court: Mr. Mansfield and Mr. Tobin?

Mr. Mansfield: If Mr. Carter wants to go. I don't want to go by myself.

Mr. Hughes: I wasn't pausing for lack of willingness. It seemed to me that it was not our decision to make.

The Court: No. Counsel have been most cooperative in this whole hearing and ordinarily this would call for at least two or three pages of an endorsement.

Hearing and Opinion Below.

I have reached the stage where I don't write too much if I can help it because I think we have got enough law books at the present time.

Mr. Daniels: May we confer for a moment?

The Court: Certainly. Go outside and confer.

I would feel much happier if you went up. You know that.

(Recess)

Mr. Carter: Your Honor, we have discussed it among ourselves and as we see it, by doing nothing in the face of your Honor's ruling, the ballgame is over.

The Court: That is right.

Mr. Carter: We have concluded that we sort of have a responsibility to see this thing through, and we will go to the Court of Appeals' office for the purpose of trying to initiate something this afternoon whereby we could seek an order of intervention for the limited purpose of making an application to extend the time, and then if they——

The Court: I think your decision is a wise one. It is one that I would make.

Mr. Carter: If that could be granted, it could be argued on the merits as to our right to intervene.

The Court: That is what I would prefer you to do personally, but you are the one to make the decision.

(Discussion off the record.)